PROTECTION BY EQUITY OF CORPORATE NAMES AGAINST UNFAIR COMPETITION.

The terms "unfair trade" and "unfair competition," when applied to the use by a corporation of its corporate name, indicate that the corporation is competing unfairly by employing a name identical with, or very similar to, one which the law has allowed a previously incorporated association to appropriate. The names in question need not be the same, but the unfairness may result from a similarity sufficiently strong to deceive a person of reasonably keen discrimination.[1] For, if such similarity or identity exists it may readily be seen that the older corporation will probably suffer injury, since the profits of the good-will which its name has created are now likely to be divided in some proportion with another. That is to say, the newer corporation, by means of its deceptive name, may attract to itself patrons of the older corporation who thus unconsciously withdraw their patronage from the very corporation with which they desire to deal and with which they believe themselves to be dealing. It is manifestly unfair that, at the expense of the older corporation, such profit should result to the new competitor by means of a good-will which it had no part in creating. Justice, therefore, requires that the law prevent such gain and protect the older corporation from the consequent loss.

Effectual interference, in such a case, requires the use of some remedy which will prevent the further continuance of such confusion and its results. From this fact it is easy to see how courts of equity acquire their jurisdiction over the subject. It is the general concern of equity to see that protection is afforded to all rights which it considers substantial enough to protect.[2] It does not take upon itself, however, the enforcement of all such rights, but only

[1] As otherwise worded in some cases, the resemblance must be such as to deceive persons exercising ordinary caution. Holmes, Booth & Hayden *v.* The Holmes, Booth & Atwood Mfg. Co. (1870) 37 Conn. 278; Bispham Eq. § 458 and cases there cited.

[2] Cf. the maxim "Equity will not suffer a right to be without a remedy," and the limitations thereon; for example, that the rights must be such as are cognizable by the courts. Story Eq. Jur. § 684; Power's Appeal (1889) 125 Pa. 186.

of such of them as are not sufficiently protected by the remedies of the common law courts. The most effective remedy which the common law courts can offer in the case under consideration is money damages for past losses. They have no power to prevent the cause of those losses from operating in the future.[2] Therefore it is that the courts of equity, to meet the situation adequately, employ the injunction to restrain the new corporation from the use of the older corporation's name.

It is clear, then, on general principles of right and wrong, why courts of equity, alone being able to meet the situation adequately, feel called upon, moreover, to do so. However, as before remarked, equity will not attempt to enforce rights which it does not consider substantial. In determining what rights are substantial it will look, first of all, at those rights which in the past have been considered so.[3] Thus in determining whether or not there is good reason for assuring to a corporation the exclusive use of its name, it consults the precedents of its courts and finds therein, and without necessity of further grounds, a warrant for its action.

From the cases in which these precedents are set forth, it appears that, while the different courts of equity have agreed as to many of the general principles which should guide them in administering their relief, they are at variance upon the question of what great governing principle forms the basis of their jurisdiction in the matter. This difference of opinion exists not only between the courts of one State or country and the courts of another,[4] but also between the various courts of the same State.[5] The purpose of this article is to set forth first, the general prin-

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[1] Bispham Eq. §16; Story Eq. Jur. § 33.

[2] Newby *v.* Oregon Central Railway (1870) 18 Fed. Cas. 42; Thomas *v.* Musical Mutual Protective Union (1890) 121 N. Y. 45; Story Eq. Jur. § 930.

[3] Of course equity, like common law, follows its precedents.

[4] Compare Lee *v.* Haley (1869) L. R. 5 Ch. App. 155, or Chas. S. Higgins Co. *v.* Higgins Soap Co. (1895) 144 N. Y. 462, with Newby *v.* Oregon Central Railway, supra.

[5] Compare Chas. S. Higgins Co. *v.* Higgins Soap Co., supra, with Roy Watch Case Co. *v.* Camm-Roy Watch Case Co. (1899) 28 Misc. 45. Also compare Lee *v.* Haley, supra, with Witherspoon *v.* Currie (1872) L. R. 5 H. L. 508, or with Clement *v.* Maddick (1859) 5 Jur. N. S. 592.

ciples upon which the courts have substantially agreed, and, second, the disagreement concerning the governing principle, with the opinion asserted by each side of the controversy.

At the outset, however, the limitations upon the subject must be carefully noted. In the first place, it is a question of equity's restraint upon the *corporation*, and not upon unincorporated associations and the like, although the same general principles would probably apply to them to some extent. Furthermore, the restraint herein considered is laid upon the corporations in *conducting their business*, and not, for example, in applying for their charters or in receiving them. It might be well to state also, at the start, that no distinction will be attempted between the cases in which equity will grant a permanent injunction and those in which it will grant the injunction *pendente lite*, since the two classes of cases seem to differ merely in the strength of proof required, and not at all in principle. Nor does there seem to be any material difference in principle, whether the injunction is sought against another domestic corporation or against a foreign one.[1]

Moreover, since the corporations in this country are now incorporated principally under general statutes,[2] the questions which arise in case of incorporation by special statute have become comparatively unimportant. Therefore, since it is not possible within the limited space of this article to consider all the phases which the subject may assume, I may state that it is not my intention to consider the restraint imposed by equity upon corporations incorporated by special statute. It might be well to say, in passing, however, that when this form of incorporation was more common in Massachusetts than it is now,[3] the courts of that State held that a corporation could not be enjoined, except on behalf of the State, from using a name under which it had been thus incorporated.[4] These cases are de-

[1] American Clay Mfg. Co. *v.* American Clay Mfg. Co. (1901) 198 Pa. 189.

[2] See *e.g.*, N. Y. Const. Art. viii. Sec. 1.

[3] Under the present Massachusetts statute almost all corporations. except railroads and other quasi-public corporations, are incorporated under general statutes.

[4] Boston Rubber Shoe Co. *v.* Boston Rubber Co. (1889) 149 Mass. 436. The same view was held by the courts of Rhode Island. Cf. Paulino *v.* Portuguese Beneficial Assn. (1893) 18 R. I. 165.

cided on the ground that the name is a part of the corporate franchise and that, when the Commissioner in the exercise of his discretion has allowed to a corporation the franchise, and as a part thereof the name, it is not permissible for courts of equity to review his decision.[1]

Proceeding, then, to the substance of the discussion, we may consider first those general principles upon which the courts are substantially in agreement. In the first place, there is almost decisive authority to the effect that a corporation is protected in the use of its name upon principles very similar to those which govern the protection of trade-marks.[2] It is seldom urged that the corporate name is exactly a trade-mark,[3] so that the rules applicable to trade-mark cases are not necessarily applicable, *in toto*, to the cases under consideration. Most of them, however, may be so applied.

A corporation will not be protected, as a rule, in its exclusive use, as a name, of words which are the property of the general public. Thus a corporation cannot appropriate, as against other corporations, a generic term,[4] though a few cases hold to the contrary; as the case of the Merchants Detective Association *v.* The Detective Mercantile Agency,[5] where the court says: "It is doubtless the rule that generic terms or mere descriptive words are not ordinarily susceptible of appropriation[6] by an individual . . . It may be doubted whether the foregoing rule

[1] His decision was made reviewable, in the case of corporations incorporated under general statutes, by Laws of Mass. 1891, Ch. 257.

[2] Eliot on Priv. Corp. §48, and cases there cited; Thompson on Corp. §296; Boone on Corp. §32; Sebastian on Trade-Marks (2nd Ed.) 245; Hendricks *v.* Montague (1881) 17 Ch. Div. 638; Chas. S. Higgins Co. *v.* Higgins Soap Co., supra.

[3] And yet it is so held in Newby *v.* Oregon Central Ry., supra.

[4] Amoskeag Mfg. Co. *v.* Spear (N. Y. 1849) 2 Sandf. 599, followed in Delaware & Hudson Canal Co. *v.* Clark (1871) 13 Wall. 311. Also cf. Eliot on Priv. Corp. §48.

[5] (1887) 25 Ill. App. 250. Also cf. Newby *v.* Oregon Central Ry., supra.

[6] Concerning the protection of generic terms, &c., as trade-marks, the federal courts seem to disagree with the New York Court of Appeals. Thus in Gannert *v.* Rupert (1904) 127 Fed. 962, "Comfort," as the title of a magazine, was protected by the Circuit Court of Appeals, while in Cooke & Cobb Co. *v.* Miller (1902), 169 N. Y. 475, protection was refused in the word "favorite" as applied to a letter-file. But in Waterman *v.* Shipman (1891) 130 N. Y. 301, "ideal," as a name for fountain pens, was protected.

should be held to apply to the name of a corporation." Nor can a trade-mark or an exclusive corporate name be formed from a word which describes an ordinary article,[1] or the general character of a business,[2] and is a necessary part of the name of all corporations engaged in that kind of business.[3] Nor will the corporation be assisted by the court in assuming for its own the name of some country, State, or locality, as one corporation attempted to do when seeking protection in the name "Lackawanna Coal Co."[4]

Likewise it is true, as is the case with trade-marks,[5] that the corporate name must not itself contain any misrepresentations,[6] for the hands of a corporation which itself has assumed a deceptive name, are not sufficiently clean for equity to place therein the injunction for which they beg.

For a long time there was a considerable difference of opinion as to whether a corporation, by assuming as a part of its own name the name of an individual, could gain an exclusive right thereto as against other individuals of the same name. We may say, however, that the authorities are now agreed upon the following propositions. An individual, as such, has the right to the use of his own name in his unincorporated business, even though a previously existing company has acquired valuable good will by the use of the same name.[7] In exercising this right, however, the new competitor must act honestly and refrain from any active attempts to deceive the public.[8] If he should attempt such deceit, equity would not enjoin him from using his name, but would merely enjoin the manner of its use.[9] Where, however,

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[1] Delaware & Hudson Canal Co. *v.* Clark, supra.

[2] Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co. (1888) 128 U. S. 598.

[3] Idem.

[4] Delaware & Hudson Canal Co. *v.* Clark, supra. But, in an old English case, the plaintiff was allowed to appropriate the word "Glenfield," Witherspoon *v.* Currie, supra.

[5] Siegert *et al.* *v.* Gandolfi *et al.* (1905) 139 Fed. 917.

[6] Lee *v.* Haley, supra; Delaware & Hudson Canal Co. *v.* Clark, supra; Bispham Eq. p. 585.

[7] Meneely *v.* Meneely (1872) 62 N. Y. 427; also Singer Mfg. Co. *v.* June Mfg. Co. (1895) 163 U. S. 169.

[8] Meneely *v.* Meneely, supra; Hazelton Boiler Co. *v.* Hazelton Tripod Co. (1891) 40 Ill. App. 430.

[9] Meneely *v.* Meneely, supra; Hazelton Boiler Co. *v.* Hazelton Tripod Co., supra.

he attempts to give his name to a corporation when the same name is already in use, under circumstances likely to lead to confusion, it was recently held that the court may enjoin the second corporation absolutely from the use of the individual's name, even though the individual may be one of the principal incorporators.[1] The reason for this distinction was admirably worded by Judge Lacombe, in Wyckoff, Seamans & Benedict *v.* The Howe Scale Company, when that case was before the Circuit Court of Appeals: "No one may be excluded from taking up whatever business he chooses by the circumstance that some one else of the same name has made a reputation in it, nor may he be required to conduct such business under an alias. . . . It is through no fault of his that his name happens to be the same as that of some other man who has already impressed his personality on some particular industry. All that is required of him is that he shall use reasonable precautions to prevent confusion; that he shall refrain from any affirmative act which may produce it. . . . In the case of a corporation, however, the situation is different. The choice of its name is voluntary. Such name is an artificial thing which can be selected by its incorporators from the entire vocabulary of names." But, though the language of this case may commend itself to reason, the distinction therein drawn was abrogated when the case was overruled in April, 1905, in the United States Supreme Court.[2] The rule was there laid down, for the federal Courts at any rate, that "in the absence of contract, fraud, or estoppel, any man may use his own name . . . as the whole or a part of a corporate name."

It is also true, on the analogy of trade-mark rights, that when a corporation sells its business it may sell its name as an integral part of its business. The modern cases, moreover, hold that such name would pass with the business when sold, though no express mention of it were made at the time of the sale.[3] But when the name, in which an

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[1] Wyckoff, Seamans & Benedict *v.* Howe Scale Co. (1903) 122 Fed. 348. The name "Remington" was forbidden to a competing typewriter company.

[2] (1905) 198 U. S. 118.

[3] Steinfield *v.* National Shirt Waist Co. (N.Y. 1904) 99 App. Div. 286; Merry *v.* Hoopes (1888) 111 N. Y. 415; Holmes, Booth, &c. *v.* The Holmes, &c., Co., supra.

exclusive right is thus sought by implication, is also the name of one of the incorporators, there is some authority to the effect that the individual may thereafter use his name, unless he has expressly agreed not to do so.[1]

The results of delay in bringing suit,[2] when a trade-mark has been infringed upon, are set forth in McLean *v.* Fleming,[3] where the court says, by Judge Clifford: "Unreasonable delay in bringing suit is always a serious objection to relief in equity; but cases arise . . . before the court where the complainant may be entitled to an injunction to restrain the future use of a trademark even when it becomes the duty of the court to deny the prayer of the bill of complaint for an account of past gains and profits." How great a delay is necessary to bar the right to protection against future infringement is not clearly indicated, but it would seem from the rest of this case that such delay would have to be very gross indeed. For at page 253 the court says "Equity courts will not in general refuse an injunction on account of delay[4] in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits." While I have not as yet found a case which expressly applies the same rules to a suit brought against a corporation for infringement upon another's name, it would seem that the same reasoning must certainly so apply to some extent, for the courts will surely be loath to deprive a corporation of the exclusive enjoyment of its name, although they may refuse recompense for past losses, insignificant in value as compared with the loss which would result from the continued infringement.[5]

Leaving, then, the cases on trade-mark analogy, we may say that the courts of equity also agree that, in granting their relief, the circumstances of each case must be con-

[1] Hazelton Boiler Co. *v.* Hazelton Tripod Co., supra; Bates Mfg. Co. *v.* Bates Machine Co. (Fed. 1905) N. Y. L. J. Oct. 31, 1905. But of course he could not actively attempt to deceive the public (id.).

[2] "Vigilantibus non dormientibus aequitas subvenit."

[3] (1877) 96 U. S. 245, 251.

[4] This language seems to indicate that no delay would be sufficient to bring about this result. There would, of course, be some limit.

[5] But, see Colonial Dames of America *v.* Colonial Dames of the State of N. Y. (1899) 29 Misc. 10; aff'd 173 N. Y. 586. This, however, was not a controversy between business corporations.

sidered.[1] In practically every decision on the subject which I have read, the court asserts that doctrine either expressly or by implication. Thus in the case of the Hygeia Water Ice Co. *v.* The New York Hygeia Ice Co.,[2] the court refused an injunction to the plaintiff because of the fact that the plaintiff, though older, was never active, and the defendant was a larger concern with a business growing by its own industry, and apparently in no way by means of the plaintiff's limited reputation.

Reasoning along the same lines, the courts have practically agreed that probability of loss, at the least, from the resemblance of names must be shown as a condition precedent to obtaining relief. Thus in the case of the Commercial Advertiser Association *v.* Haynes,[3] the court says: "The rule is that, while the court will undoubtedly afford relief against such a simulation . . . as is calculated to mislead the public and consequently injure the newspaper's circulation . . . , yet it will not interfere when no harm has been done . . . or is likely to be done."[4] To the same effect is the case of the Hygeia Water Ice Co. *v.* The N. Y. Hygeia Ice Co.[5] Actual loss, however, is usually held unnecessary.[6] Thus it is said in the case of The Roy Watch Case Co. *v.* Camm-Roy Watch Case Co.:[7] "In the present state of the law it is not necessary upon the facts here disclosed for the plaintiff to show any actual pecuniary injury. The injury necessary to sustain the action is implied in the act of the defendant in wrongfully appropriating the name of the plaintiff."

Up to this point I have purposely avoided any discussion of the controversy as to what governing principle, as I have called it, lies at the basis of equity's interference in these cases. I have tried to select language which favors

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[1] This, of course, is true of all the cases which come before equity.

[2] (1893) 140 N. Y. 94. [3] (N. Y. 1898) 26 App. Div. 279, 281.

[4] See also Bradbury *v.* Beeton (1820) L. J. 39 Ch. 57; Clement *v.* Maddick, supra; Lee *v.* Haley, supra; Farmers' Loan & Trust Co. *v.* F. L. & T. Co. of Kansas (1888) 1 N. Y. Supp. 44.

[5] Supra.

[6] American Clay Mfg. Co. *v.* American Clay Mfg. Co., supra. These cases, also, seem to follow the trade-mark cases. Cf. T. A. Vulcan *v.* Myers (1893) 139 N. Y. 364.

[7] Supra.

neither one side of the controversy nor the other. It would be well to look into that question at some length. This difference of opinion may be conveniently set forth by extracts from a few of the many cases which support each point of view.

In the case of Newby *v.* Oregon Central Railway,[1] Judge Deady of the Circuit Court of Appeals for the District of Oregon, expresses his opinion as follows: "The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity. . . . *The motives of the persons attempting the wrongful appropriation are not material.* . . . The act is an illegal one and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it." In the case of Holmes, Booth & Hayden *v.* The Holmes, Booth & Atwood Mfg. Co.,[1] the court says that the existence of fraud would seem to be immaterial. In the case of The Roy Watch Case Co. *v.* The Camm-Roy Watch Case Co.,[1] the opinion is set forth as follows: "The courts of England and the United States are unanimous in condemning the use of the same or a similar name calculated[2] to deceive. This is the rule, regardless of the motive."[3]

On the other hand, in the case of Lee *v.* Haley, cited with approval in Chas. S. Higgins Co. *v.* Higgins Soap Co., and in numerous other cases, the learned Justice says, in delivering the court's opinion: "I quite agree that they [the plaintiffs] have no *property* in the name, but the principle upon which the cases proceed is, not that there is *property* in the word [the name of the company] but that it is a fraud on a person[4] who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a

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[1] Supra.

[2] "Calculated" is evidently here used to mean likely and not to mean intended.

[3] See also American Clay Mfg. Co. *v.* American Clay Mfg. Co., supra.

[4] Although this language would seem to apply only to an individual, nevertheless the defendant in this case was the representative of a company; moreover the case is often cited *e. g.*, in Chas. S. Higgins Co. *v.* Higgins Soap Co., as applying to a corporation.

slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In determining which of these two doctrines is the more worthy of credence, there are several points of view from which to consider the question. At the outset we may say that probably the greater number of authorities, especially of the more recent ones[1], hold that fraud is necessary to support an action based on alleged unfair competition. The authorities on the other side, however, are amply sufficient to render the question an open one and to justify a discussion which is not, in any sense, an assault upon the maxim "*stare decisis*."

If, as Lee *v.* Haley and the cases following it hold, there is no property in the corporate name, this rather conflicts with the established rule that equity will protect only those rights which it considers substantial by reason of the fact that they involve a right to property.[2] Following out this general principle of equity, we should say that all rights which equity protects, whether against fraudulent or other attack, are rights of property. The real question, however, is whether or not the property of a corporation in its name is so absolute as to be protected against *innocent* infringement.

One of the strongest arguments which can be urged on behalf of those who contend that no fraud is necessary is suggested by the close analogy of these cases to the trade-mark cases. The authorities are fairly well settled to the effect that a trade-mark is an exclusive right of property, and will be protected, as such, independent of fraud.[3] The name of a corporation is valuable property to a corporation for exactly the same reason, in this aspect, that a trade-mark is valuable to a person selling goods thereby described. The value of a trade-mark is well illustrated by Lord Justice James, in

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[1] Cf. Wyckoff *et al.* *v.* Howe Scale Co., supra; A. von Faber-Castell *v.* John Eberhard Faber (N. Y. 1905) 139 Fed. 257. In both of these cases it must be noted that it was sought to enjoin the use of an *individual's* name.

[2] Bispham Eq. p. 57.

[3] Bispham Eq. p. 584; Goodyear Glove Co. *v.* Goodyear Co., supra; Clark *v.* Freeman (1848) 11 Beav. 112.

the very interesting and authoritative case of Massam *v.* Thorley's Cattle Food Co.[1]: "The words 'Thorley's Food for Cattle,' would * * * indicate to a purchaser this, 'You have always had a very good article called Thorley's food for cattle. If any article bears that name, that is to you a guarantee that it comes from the same place from which that has come with which you have hitherto been well satisfied.' That, in truth, is the meaning, object and result of a trade-mark." It seems to me that there is absolutely no logical reason for distinguishing between the name which a corporation has applied to its output, first having assumed the name as its own, and the name which some trader has applied to an article of his production, and of which he has made a trade-mark.[2] In other words it seems to me that the name of a corporation, when applied to articles of its output, stamps them just as distinctly, and in just the same way, as the name or device which characterizes a trader's goods.

Assume, therefore, that a corporation should be protected when applying its name to *articles* of its production. Why should there then be erected a barrier to the further operation of the same principle? The name of a corporation may be valuable to it otherwise than as a means of describing its articles. The name of a corporation, like that of an individual, becomes associated in the public mind with the attributes of that corporation's personality. If these attributes are pleasing, the public, when it hears or sees the name, is inclined to look with favor on that which the name represents. Thus, while the name may gain a ready reception for goods marked by it, it may also arouse favorable consideration for other mediums through which the corporation makes its profit from the public. In other words, the corporation may be enabled, by its name, to sell to the public its *services* as well as its substantial output. Thus a name of pleasing connotation is as valuable, for example, to an insurance company, or a construction company, as to a corporation which manufactures type-

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[1] (1880) 14 Ch. Div. 748.

[2] Either by registering it or otherwise. Of course, it need not be registered.

writers or hats. But what difference is there whether it is title insurance or typewriters which the corporation is able to sell to the public by means of its name? The value of the name is that it suggests ability, whether it be ability to perform pleasing services or to manufacture satisfactory goods.

Of course the corporate name might be of value to the corporation merely as a means of gaining public bounty for the objects which it holds dear, and which its name suggests to be worthy.[1] Here, likewise, the public is paying for services, though the service is rendered to other members of the public than those who pay for it. The rights of a corporation not organized for profit, however, we may omit from this discussion, since the terms "unfair trade" and "unfair competition" do not strictly apply to corporations of that character.[2]

It would seem, then, that the corporate name, when applied to the *services* or *articles* offered by the corporation, stamps them as acceptable in just the same way as a trade-mark makes salable the goods described thereby. It is quite well settled that trade-marks should be protected against all infringement, whether by fraud or otherwise. It would seem, therefore, that the same rule should apply to corporate names.[3]

To justify equity's interference, the resemblance between the name sought to be protected and that sought to be assumed must be strong enough to deceive the public, or, more accurately, those members of the public concerned,

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[1] For example, the "Society for Prevention to Cruelty to Children."

[2] See Colonial Dames of America *v.* Colonial Dames of N. Y., supra, at p. 13. A similar question, however, has arisen as to non-business corporations. The name "Society of the War of 1812" was protected in Society of the War of 1812 *v.* Society of the War of 1812 in the State of N. Y. (1900) 46 App. Div. 568; also the name "Young Women's Christian Assn.," in International Committee of the Y. W. C. A. *v.* The Y. W. C. A. of Chicago (1902) 194 Ill. 194.

[3] An exception may be strongly urged where it is sought to restrain an individual from giving his name to a corporation. To allow the exception would not militate against the principle contended for, since the right of the individual to his name would then be regarded as a *paramount right of property*, before which, in the absence of fraud, the *property* previously acquired in the same name by a corporation would have to give way. In other words, the right of the corporation would still be a right of property, though an inferior one. Such an exception would be consistent with the strongest recent authority, viz., Wyckoff *et als. v.* Howe Scale Co., supra.

whose senses of discrimination are reasonably keen.[1] This is not important, however, as to the question of "fraud vel non," since the public might be deceived by an innocently created likeness of name as well as by a fraudulently created one, though perhaps not as readily.

We should bear in mind, however, that the subject of this discussion is the restraint imposed by equity to prevent "unfair" trade and "unfair" competition. It would seem, at first blush, that the corporation which competes *unfairly* in this respect competes *fraudulently*. If the word "unfair" be taken in its popular sense it undoubtedly carries with it such a connotation, and yet, looking at the word more carefully, it seems quite apparent that the unfairness may be considered, both as committed *by* one party, and as committed *upon* the other. That is to say, an act might be unfair by reason of the intent of the person who committed it, or the same act might be unfair because of the unfortunate situation of the person affected by it. So, in this case, competition might be unfair because the newly formed corporation assumed a name already appropriated, having in mind to deceive the patrons of the older corporation to its loss, or it might be unfair because, by reason of the assumption of such a name by the newer corporation, even innocently, the older corporation might be compelled to meet unjust opposition from the unfortunate fact that the newer corporation had chanced to happen upon its name. In other words, in the latter case it would not make any particular difference to the older corporation when it *had* lost its customers, whether it had lost them by the fraud of the new competitor, or by a mere innocent coincidence in the choice of names.

Taking into consideration the fact that the question at hand is the restraint imposed on the action of the *newer corporation* in the *manner of its competition*, it would seem that the unfairness must be considered as to the party committing it, and that therefore fraud would form a necessary part of the unfairness in question. And yet, even though it does seem that the unfairness here considered lies primarily in the action of the newer corporation, nevertheless competition which was unfair, primarily, by reason of the situa-

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[1] Supra.

tion of the party affected by it would be unfair, incidentally, as to the party which derived advantage from the situation, however innocently. In other words, there might be innocently unfair competition as well as competition fraudulently unfair. But however nicely we may draw such distinctions of meaning, the fact remains that unfair competition, in connection with this subject, undoubtedly suggests fraudulent action, and that, as to this count, those who allege the necessity of fraud have somewhat the advantage, if the words chosen by the courts have been well selected.

As a matter of fact, it is very seldom indeed that a corporation assumes a name already in use and profits by the assumption of such name without knowing that the name is already in use. For, if the first corporation has acquired any considerable reputation, so that its name has become a means of selling its goods or services, surely those who enter the same field in competition must almost always know the name of a dangerous rival. Whether, in assuming the same name, the second corporation *intends* to create confusion and thereby to derive illicit profit is another question, but one which, as a rule, may be as readily answered. For if the new corporation knows that a name is already in use, and thereupon assumes that name, we may reasonably suppose that it hoped to profit from such a course of action. To be sure this would not necessarily be true if the name assumed were also the name of an incorporator, or if it were otherwise an especially convenient one. Yet, in the vast majority of the cases which come before the courts, it is true that fraudulent intent in some degree is present.

Therefore we may reason that, since names already in use and well known are seldom assumed without fraudulent design, many courts, from their general observation of these cases, have allowed themselves, without giving particular thought to the matter, to appear to have accepted the idea that such assumption, where condemned, is always a scheme of unjust gain. They have, therefore, loosely applied to such assumption the terms "unfair trade" and "unfair competition" and, by the use of these terms, have apparently founded the jurisdiction of equity upon

fraud. But it would seem that, however much those courts may thus impliedly limit their jurisdiction in these cases, the interference of equity to protect the corporate name is based upon a broader governing principle—that no person shall be deprived of his property except by due process of law.

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